

No. 12211

United States
Court of Appeals
for the Ninth Circuit

EVERT L. HAGAN, doing business as El Rey
Cheese Co.,

Appellant,

vs.

CENTRAL AVENUE DAIRY, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

FILED

MAY 1 1960

PAUL P. O'BRIEN, -

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer, Claim and Cross-Complaint.....	11
Exhibit A—Agreement of Nov. 8, 1938, between Evert L. Hagan and Central Avenue Dairy, Inc.	23
Appeal:	
Certificate of Clerk to Transcript of Record on	53
Designation of Record on (DC).....	52
Notice of	47
Order Extending Time to Docket.....	48
Statement of Points on (DC).....	50
Statement of Points on (USCA).....	55
Stipulation Respecting Cash Deposit in Lieu of Bond on	49
Certificate of Clerk to Transcript of Record on Appeal	53
Complaint in Interpleader	2
Decree	33
Deposit	6
Designation of Record on Appeal (DC).....	52

	PAGE
Judgment of Dismissal	42
Notice of Entry	43
Judgment re Moneys Deposited in Interpleader.	44
Minute Order, Nov. 8, 1948, Granting Permanent Injunction, etc.	32
Motion for Order to Issue Summons.....	7
Motion to Quash and Set Aside Service, Notice of	35
Affidavit of Ed A. Geare in Support of.....	38
Affidavit of R. William Kramer in Support of	39
Names and Addresses of Attorneys.....	1
Notice of Appeal	47
Order Extending Time to Docket Appeal.....	48
Order of Injunction and for Process.....	9
Request and Designation of Record on Appeal..	52
Statement of Points on Appeal (DC).....	50
Statement of Points on Appeal (USCA).....	55
Stipulation Respecting Cash Deposit in Lieu of Bond	49
Summons	31
Return on Service	31

NAMES AND ADDRESSES OF ATTORNEYS

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern
District of California, Central Division

No. 8741-BH

TITLE INSURANCE AND TRUST COMPANY,
a corporation,

Plaintiff,

vs.

EVERT HAGAN, doing business as EL REY
CHEESE CO., and CENTRAL AVENUE
DAIRY, INC., a corporation,

Defendants.

COMPLAINT IN INTERPLEADER

Plaintiff complains of the defendants above named,
and Alleges:

I.

This action arises under the Act approved January 25, 1948, Chapter 646, Public Law 773, Laws of the 80th Congress, Second Session; United States Code, Title 28, Section 1335, as hereinafter more fully appears.

Plaintiff is a corporation incorporated under the laws of the State of California, having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California.

Defendant, Evert Hagan, doing business as El Rey Cheese Co., is a resident of and has his place of busi-

ness in the City of Los Angeles, County of Los Angeles, States of California. [2]

Defendant, Central Avenue Dairy, Inc., a corporation, is a corporation organized under the laws of the State of Arizona, and having its principal place of business in the City of Phoenix, State of Arizona.

The matter in controversy exceeds the sum of \$500.

II.

That on or about September 6, 1946, defendants, Evert Hagan, doing business as El Rey Cheese Co., and Central Avenue Dairy, Inc., opened an escrow with plaintiff, known in its files and records as Escrow No. 2494622, and said defendant, Evert Hagan, deposited the sum of \$1750 therein, to be disbursed after certain reconveyances of trust deeds in said instructions described had been received and upon further instructions for disbursement "from both Evert Hagan and Central Avenue Dairy, Inc., or from a court of competent jurisdiction."

III.

That thereafter certain requests for reconveyances of deeds of trust were deposited in said escrow and recorded and used in accordance with the escrow instructions of defendants; but no further instructions for the disbursement of said sum of \$1750 have ever been given plaintiff by both defendants, Evert Hagan and Central Avenue Dairy, Inc., a corporation, and no instruction has ever been given plaintiff by a court of competent jurisdiction or any court.

That thereafter, and on or about December 3, 1947, said Evert Hagan, doing business as El Rey Cheese Co., made demand upon plaintiff for the return of said sum of said \$1750 to him, which demand has thereafter been repeatedly made upon plaintiff.

That said Central Avenue Dairy, Inc., by and through its attorneys has refused to approve or acquiesce in such demand of said defendant. Evert Hagan, doing business as El Rey Cheese Co., and has demanded that said monies so deposited in said escrow [3] be turned over and paid to it because of said releases and reconveyances of deeds of trust deposited and used in said escrow as provided for in said written instructions.

IV.

That by reason of the conflicting claims and demands of defendants, plaintiff is in doubt as to which defendant is entitled to receive the monies deposited with plaintiff as hereinbefore set forth and has no remedy at law and cannot determine said claims except at great peril and risk.

V.

That plaintiff makes no claim to said sum of \$1750, except to have said sum disbursed to the person legally entitled thereto.

VI.

That plaintiff has deposited with the Registry of this Court said sum of \$1750 there to abide the judgment of the Court. That said deposit and said pay-

ment so made into Court was made by plaintiff herein at the commencement of this action.

VII.

That it has become necessary for plaintiff to institute this action in interpleader to avoid a multiplicity of actions, unnecessary attorney's fees, and costs of suit, and irreparable injury and damage.

Wherefore, in consideration of the premises, and inasmuch as plaintiff is without an adequate remedy except by this action of interpleader, plaintiff prays:

That process issue out of this Honorable Court directed to the defendants, and each of them, and that an order of injunction against said defendants, and each of them, be made enjoining the defendants, and each of them, from instituting or prosecuting any suit or proceeding in any State Court or in any [4] United States Court, on account of the monies described in this complaint and deposited by plaintiff in the Registry of this Court until further order of the Court.

That such process and order of injunction be made returnable at such time as this Honorable Court shall determine and shall be addressed to and served by the United States Marshals for the respective districts wherein said defendants reside or may be found.

That said defendants, and each of them, be required to interplead concerning their claims, if any, to the above-described money and to set forth their interest in and claims to the same.

That the Court determine the validity of their respective interest and claims, and order and direct the disposition of said money.

That upon the hearing and determination of this cause, plaintiff be discharged from any and all further liability to the defendants, and each of them, on account of the money above described, and that said injunction be made permanent; and for such other, further, and different general relief as to the Court may seem meet and proper.

ARCH. H. VERNON,
LAWRENCE L. OTIS,
GILBERT E. HARRIS,

By /s/ ARCH. H. VERNON,
Attorneys for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Oct. 7, 1948. [5]

[Title of District Court and Cause.]

DEPOSIT

To: Mr. Edmund L. Smith, Clerk of the United States District Court:

Plaintiff herewith hands you for deposit in the Registry of the Court in the above action, the sum of \$1750 (Check No. 439367, drawn by Title Insurance and Trust Company on The Farmers and Merchants National Bank of Los Angeles, at Los Angeles, California, payable to you); the above being

all of the property described in the complaint in the above-entitled action and interpleaded by plaintiff herein.

Dated the 7th day of October, 1948.

ARCH. H. VERNON,
LAWRENCE L. OTIS,
GILBERT E. HARRIS,

By /s/ ARCH. H. VERNON,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 7, 1948. [7]

[Title of District Court and Cause.]

MOTION

Plaintiff moves the Court for an order directing the Clerk of said Court to issue a summons herein directed to defendant, Evert Hagan, doing business as El Rey Cheese Co., requiring said defendant to answer the complaint herein within twenty days after service of said summons upon him, and notifying him that, if he fails to do so, judgment by default will be taken against him for the relief demanded in the complaint, and addressed to the United States Marshal of the Southern District of the State of California, in which said defendant resides, for service upon said defendant; and to issue an additional summons directed to defendant, Central Avenue Dairy, Inc., a corporation, requiring said defendant to answer the complaint herein with twenty days after the service of such summons upon

it, and notifying it that if it fails so to do, [8] judgment by default will be taken against it for the relief demanded in the complaint, and addressed to the United States Marshal of the District of Arizona, State of Arizona, in which said defendant resides; and

For an order of injunction enjoining said defendants, and their respective attorneys, agents and representatives, or either or any of them, until the further order of this Court, from instituting or prosecuting any suit or proceeding in any State Court or in any United States Court on account of the money described in the complaint herein; and

Further ordering said defendants, and each of them, to show cause, if any they have, at such time as shall be determined by the Court, why the foregoing order of injunction should not be made permanent; and why a decree should not be made and entered discharging plaintiff from all and any further liability to said defendants, or any or either of them; and for such other and further orders and decrees as may be necessary and proper in the premises; and

For a further order directing that a copy of such order shall be served upon each of the defendants with the summons and copy of the complaint ordered served upon them herein, by said respective United States Marshals, and that the respective United States Marshals shall make return of service of such process and a copy of said complaint and a copy of such order not later than twenty days after the service thereof.

This motion is based upon the verified complaint herein, and the provisions of Section 1335, Title 28 United States Code, approved January 25, 1948, and effective September 1, 1948.

Dated October 7th, 1948.

ARCH. H. VERNON,
LAWRENCE L. OTIS,
GILBERT E. HARRIS,

By /s/ ARCH. H. VERNON,
Attorneys for Plaintiff.

Acknowledgment of Service.)

[Endorsed]: Filed Oct. 7, 1948. [9]

[Title of District Court and Cause.]

ORDER OF INJUNCTION AND FOR PROCESS

Good cause appearing therefor from the verified complaint on file herein:

It Is Ordered that the Clerk of the above-entitled court issue a summons herein directed to defendant, Evert Hagan, doing business as El Rey Cheese Co., requiring said defendant to answer the complaint herein within twenty days after the service of said summons upon him, and notifying him that, if he fails to do so, judgment by default will be taken against him for the relief demanded in the complaint, and addressed to the United States Marshal of the Southern District of the State of California for service upon said defendant; and to issue an

additional summons directed to the defendant, Central Avenue Dairy, Inc., a Corporation, requiring said defendant to answer the complaint herein within [10] twenty days after the service of such summons upon it, and notifying it that if it fails to do so, judgment by default will be taken against it for the relief demanded in the complaint, and addressed to the United States Marshal of the District of Arizona, State of Arizona; and

It Is Further Ordered that said defendants and their respective attorneys, agents, and representatives, or any or either of them, are enjoined from instituting or prosecuting any suit or proceeding in any State Court, or in any United States Court, on account of the money described in the complaint herein, until the further order of this Court herein; and

It Is Further Ordered that said defendants, and each of them, show cause, if any they have, on the 8th day of November, 1948, at 10:00 o'clock of said day, at the Court Room of the Honorable Ben Harrison, Judge of this Court, in the Federal Building in the City of Los Angeles, County of Los Angeles, State of California, why the foregoing injunction should not be made permanent and why a decree should not be made and entered discharging Plaintiff from any and all liability to said defendants, or any or either of them; and for such other and further orders and decrees as may be proper and necessary in the premises; and

It Is Further Ordered that a copy of this order be served upon each of the defendants, with the

summons and a copy of the complaint ordered served upon them herein by said respective United States Marshals, and that the said respective United States Marshals shall make return of the service of said summons and a copy of said complaint, and a copy of this order, not later than twenty days after service thereof.

Dated: the 7th day of October, 1948.

/s/ LEON R. YANKWICH,
Judge of the United States
District Court.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 7, 1948. [11]

[Title of District Court and Cause.]

ANSWER, CLAIM, AND CROSS-COMPLAINT
OF DEFENDANT-CLAIMANT, EVERT L.
HAGAN.

Comes Now, Evert L. Hagan, defendant-claimant, in the above-entitled cause of action, and denies, admits, alleges and avers as follows:

ANSWER

I.

This action arises under the Act approved January 25, 1948, Chapter 646, Public Law 733, Laws of the 80th Congress, Second Session; United States Code, Title 28, Section 1335, as hereinafter more fully appears.

Plaintiff is a corporation incorporated under the

laws of the State of California, having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California. [12]

Defendant, Evert Hagan, doing business as El Rey Cheese Co., is a resident of and has his place of business in the City of Los Angeles, County of Los Angeles, State of California.

Defendant, Central Avenue Dairy, Inc., a corporation, is a corporation organized under the laws of the State of Arizona, and having its principal place of business in the City of Phoenix, State of Arizona.

That the matter in controversy exceeds the sum of \$500.00.

II.

Defendant, Evert L. Hagan, admits that the plaintiff, Title Insurance and Trust Company, a corporation, of the City of Los Angeles, County of Los Angeles, State of California, located at 433 South Spring Street, is the escrow-holder in escrow No. 2-494-622, wherein there is deposited the sum of \$1750.00; that said escrow was entered into between Evert L. Hagan, doing business as El Rey Cheese Co., and Central Avenue Dairy, Inc., a corporation, on or about the 6th day of September, 1946; this defendant admits that both Evert L. Hagan and the Central Avenue Dairy, Inc., have made demand and claim from the plaintiff herein, Title Insurance & Trust Company, a corporation, for said \$1750.00; that this defendant Evert L. Hagan, admits that the plaintiff, Title Insurance & Trust Company, is a disinterested stake-holder of the said sum of

\$1750.00; and further admits that unless interpleader is adjudged proper, that the plaintiff, Title Insurance & Trust Company will be placed in great peril of being subjected to double liability on account of said sum.

Wherefore, defendant, claimant, Evert L. Hagan, desires to join in the prayer of the plaintiff, Title Insurance & Trust Company, that an interpleader by judged proper, that plaintiff be allowed to pay into the registry of the Court, the sum of \$1750.00 less its costs herein incurred and a reasonable sum as and for its attorney fees and be discharged from all liability to Evert L. Hagan, and the Central Avenue Dairy, Inc., on account of said escrow agreement, and [13] defendant, claimant, Evert L. Hagan, prays that the temporary injunction heretofore issued restraining Evert L. Hagan, and the Central Avenue Dairy, Inc., from proceeding in any State or Federal Court, be made permanent.

And, Evert L. Hagan, Bases His Claim for the Said Sum of \$1750.00 Upon the Following Allegations:

CLAIM

I.

Repeats each and all of the allegations contained in Paragraph I, of the foregoing Answer and makes the same a part hereof as though set forth herein in full.

II.

Claimant, Evert L. Hagan, alleges that for a number of years prior to 1932, he had, at his own ex-

pense, and outlay of time, carried on experiments for the manufacture of cheese, and cheese food products. That, as a result of his experiments, Evert L. Hagan perfected and invented formulas for manufacturing two proudcts, the same being:

- 1—"Queso Duro Cheese," otherwise known as "La Barca";
- 2—"Queso Blanco Cheese," otherwise known as "El Rey Cheese."

Claimant alleges that the entire process for the manufacture of these products was the result of the inventive efforts of this claimant, Evert L. Hagan; that when the same was perfected, he entered into an oral agreement with the Central Avenue Dairy, Inc., whereby they were given the formulas and secret processes, and the right to produce such cheese, but, this claimant, Evert L. Hagan, reserved the sole right to distribute and sell said cheese, in the entire United States. Claimant, Evert L. Hagan, alleges that pursuant to said oral agreement, the Central Avenue Dairy, Inc., did manufacture said cheese, according to the process and trade secrets perfected by this claimant, Evert L. Hagan, and this claimant set up distribution outlets, in the States of Texas, New Mexico and California, and, Arizona; Claimant further [14] alleges that this arrangement was continued from 1932 until November 8th, 1938, when a different arrangement was entered into between this claimant, Evert L. Hagan and the Central Avenue Dairy, Inc., by written contract, a copy of which is hereto attached, and marked

Exhibit "A", which is made a part hereof, by reference, as though set forth herein in full.

Claimant, Evert L. Hagan, alleges that under the said written agreement of November 8th, 1939, this claimant gave to the said Central Avenue Dairy, Inc., the sole right to retail and wholesale the two cheese products, "La Barca" and "El Rey" in the States of Arizona, New Mexico and Texas; and that the said Central Avenue Dairy, Inc., agreed to furnish "La Barca" and "El Rey Cheese" to claimant herein, Evert L. Hagan, exclusively in the State of California, at a price schedule as set forth in Paragraph Three of said written agreement and contract of November 8th, 1938, which schedule is as follows:

Queso Duro Cheese, Brand "La Barca"	
Bricks and Loaves.....	71½c
Talls (11½ lbs.)	8c
Barcas (3 lbs.)	8c
Queso Blanco Cheese, Brand "El Rey"	
10 lbs.	9c

III.

Claimant, Evert L. Hagan, further alleges that at the time of the written agreement of November 8th, 1938, there was a balance due from claimant Evert L. Hagan, to the Central Avenue Dairy, Inc., for the past deliveries made to claimant Evert L. Hagan, and that said balance due amounted to \$3795.04; that in said written agreement of November 9th, 1938, it was agreed in Paragraph Four thereof, that

the said amount was to be paid to the Central Avenue Dairy, Inc., in the following manner: [15]

“First Party agrees specifically to pay 1c per pound over and above the prices scheduled aforesaid for every pound of cheese ordered by him hereafter, which 1c per pound is to be applied to the repayment of the above account stated as set forth hereinabove, such added payment of 1c per pound to be paid until the account in the sum of \$3795.04 is paid in full, with interest thereon from date at the rate of six per cent per annum.”

And it was further agreed in said agreement as follows:

“First Party specifically agrees to order and purchase from Second Party, freight to be paid by the First Party, under the terms and conditions aforesaid, not less than 9,000 pounds of cheese per month hereafter, of either “El Rey” or “La Barca” or both, in the aggregate until such time as the account of \$3795.04 and interest had been paid in full;

“8. Second Party agrees to ship such amount and kinds of cheese to the First Party as ordered by the First Party, and accompanied by the check of the First Party, as hereinabove provided, providing the sale price of said cheese, as herein provided, covering the sale price of said cheese, as per schedule aforesaid, plus one cent per pound, on all cheese ordered, which one cent per pound, Second Party agrees to apply to the delinquent account of the First Party as aforesaid. Second Party further

agrees to supply First Party, freight to be paid by First Party, promptly upon receiving the order of the First Party”;

IV.

Said contract of November 8th, 1938, guaranteed to the said Evert L. Hagan, that he was to receive the two named types of cheese exclusively in the State of California, from the Central Avenue Dairy, Inc., said contract providing:

“Second Party agrees to supply no other person or persons in the State of California with the grades and types of cheese, hereinbefore referred to, during the life of this agreement, and [16] Second Party agrees to supply no cheese of the types aforesaid to any person anywhere, knowing said cheese is to be offered for sale in competition with First Party in the State of California during the life of this agreement.”

V.

Claimant, Evert L. Hagan, alleges that the duration of said agreement was provided in Paragraph 12 thereof as follows:

“It is hereby mutually agreed by and between the parties hereto that this agreement shall remain in full force and effect so long as the First Party owes any balance of account to Second Party, either in connection with the stated balance due at the date of the execution of this agreement, to wit, \$3795.04 and interest, or in connection with any further credit extended to the First Party during the life of this agreement, which additional credit

may be granted at the option of the Second Party, but it is distinctly understood that it is not required to be given under the terms of this agreement."

VI.

Claimant, Evert L. Hagan, alleges that simultaneously with the entering into of the written agreement of November 8th, 1938, claimant executed his promissory note in the amount of \$3795.04, with interest at 6% per annum, secured by deed of trust upon lots 14 and 15, Block 9, Tract 5329 as per Map recorded in Book 60, Page 39, of Maps, in the office of the County Recorder of Los Angeles County, State of California, and claimant also executed a chattel mortgage on all of the personal property located on said afore-described real property; claimant alleges that said deed of trust and chattel mortgage were given to secure to the Central Avenue Dairy, Inc., full performance of the contract agreement of November 8th, 1938, on behalf of this claimant, Evert L. Hagan.

Claimant alleges that upon September 6th, 1946, the security given by claimant, Evert L. Hagan, as set forth in the preceding [17] paragraph, was released by the said Central Avenue Dairy, Inc., and this claimant deposited the sum of \$1750.00, now the subject of this interpleader action, with the Title Insurance & Trust Company, as escrow holder in lieu of said deed of trust and chattel mortgage; claimant alleges that this exchange of security was effected after numerous breaches of the contract of November 8, 1938.

VIII.

Claimant, Evert L. Hagan, alleges that from and after November 8, 1938, he, duly performed and fully complied with all the obligations, conditions, precedent and terms imposed upon him by the said written agreement; that he has at all times ordered, received and paid for all deliveries of the two cheeses that were contracted for therein, and that he has ordered an amount equal to the amount agreed upon in said written contract of November 8th, 1938; but claimant alleges that notwithstanding claimant's full performance, the Central Avenue Dairy, Inc., committed the following breaches of the contract of November 8th, 1938, to the injury and damage of the claimant, Evert L. Hagan:

1—Upon July 1st, 1941, contrary to Paragraph three of said written agreement of November 8th, 1938, the Central Avenue Dairy, Inc., refused to deliver cheese at the schedule of prices therein set up, but required an additional one cent per pound; that on August 15th, 1941, the Central Avenue Dairy, Inc., wholly disregarding said contract clause setting up the schedule of prices, and arbitrarily refused to deliver cheese thereunder at said scheduled prices, but demanded fifteen cents per pound; that upon April 1st, 1943, the said Central Avenue Dairy, Inc., arbitrarily raised said price, contrary to said price schedule set out in the written contract of November 8th, 1938, to eighteen cents per pound.

2—The said Central Avenue Dairy, Inc., did on September 16th, 1939, without just cause, failed and

refused to [18] make any further shipments of El Rey Cheese,

3—That said Central Avenue Dairy, Inc., did, during the term and life of said contract, ship both “La Barca” and “El Rey” cheese to Ollie Brown, doing business as The Ramona Provision Company, in the City of Los Angeles, County of Los Angeles, State of California, and to Thomas Gonzales, doing business as the American Chile Products, in the City of Los Angeles, County of Los Angeles, State of California, without the consent and against the will of this claimant.

4—The said Central Avenue Dairy, Inc., did, contrary to the written agreement of November 8th, 1938, shipped during the month of July and August, 1945, and prior thereto, cheese which was not of good quality and merchantable condition, and the same was of such poor quality and in such a condition of spoilage that it was seized by the United States Government Food and Drug Administration, and the Food and Drug Administration of the State of California.

5—During the month of August, 1945, the Central Avenue Dairy, Inc., at a time when said Central Avenue Dairy, Inc., admitted there was yet to be delivered to this claimant, Evert L. Hagan, under the agreement of November 8th, 1938, a remainder of 110,000 pounds of cheese, did refuse and fail to make any further deliveries under said contract, and does not and will not at this time comply with the terms of said written agreement and does now con-

tinue and fail and refuse orders for said cheese from this claimant, Evert L. Hagan.

IX.

Claimant alleges that under the terms of the written agreement of November 8th, 1938, there was only one means for the payment of the balance due to the Central Avenue Dairy, Inc., in the amount of \$3795.04 and that that was by the payment of one cent per pound, additional for each pound delivered under the agreement of November 8th, 1938. Claimant alleges that by reason of the breach set forth herein, payment by the claimant in the manner as provided by the contract was made impossible. Claimant alleges this impossibility was [19] brought about solely due to the acts and conduct of the said Central Avenue Dairy, Inc., and that the legal effect of said acts and conduct by said Central Avenue Dairy, Inc., was to effect a waiver of payment of said balance and the right to have and retain security for the payment thereof; that by reason of the breaches alleged, which prevented performance on behalf of this claimant, Evert L. Hagan, a waiver of the rights to payment in the manner provided for in the contract by Central Avenue Dairy, Inc., to all of its right to make any claim upon the fund before the Court, to wit, the \$1750.00 now deposited in the registry of the Court.

Wherefore, this claimant prays the Court to make an Order adjudging that Evert L. Hagan, alone, is entitled to receive the sum of \$1750.00, less costs and a reasonable sum for attorneys' fees, heretofore

deposited in the registry of this Court by the Title Insurance & Trust Company; that Evert L. Hagan be awarded his costs herein incurred, and for such other and further orders as the Court may deem just and proper in the premises.

And the Claimant, Evert L. Hagan, Further as Cross - Complainant Against Central Avenue Dairy, Inc., Alleges and Avers as Follows:

CROSS-COMPLAINT

I.

Cross-Complainant, Evert L. Hagan, re-alleges and by reference makes Paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the Claim of Evert L. Hagan, a part hereof as though set forth herein in full.

II.

Cross-Complainant alleges that by reason of the breach of the contract as alleged in Paragraph VIII of the claimant's claim, this cross-complainant has been damaged in the sum of \$200,000.00. [20]

Wherefore, Cross-complainant prays the Court to award him judgment in the amount of \$200,000.00 and in addition, give him judgment for his costs herein expended, and for such other and further orders the Court may deem proper in the premises.

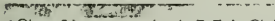
/s/ GUY B. GRAHAM,
Attorney for Claimant and Cross-Complainant,
Evert L. Hagan.

State of California,
County of Los Angeles—ss:

Evert L. Hagan, being first duly sworn, deposes and says: That he is a party defendant, claimant and cross-complainant in the foregoing and above-entitled action; that he has read the foregoing Answer, Claim and cross-complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes to be true.

/s/ EVERT L. HAGAN,
Affiant.

Subscribed and sworn to before me this 29th day of October, 1948.

(Seal)  /s/ MACARIO V. BALLESTEROUS,
Notary Public in and for the County of Los Angeles, California.

My commission expires March 15th, 1949.

[Endorsed]: Filed Nov. 1, 1948. [21]

[Title of District Court and Cause.]

EXHIBIT "A"

Agreement of November 8th, 1938, Between Evert L. Hagan, and Central Avenue Dairy, Inc. [22]

AGREEMENT

This Agreement, made and executed this 8th day of November, 1938, by and between Evert L. Hagan,

Party of the First Part, of 115 North Eastern Avenue, Los Angeles, California, and Central Avenue Dairy, Incorporated, Party of the Second Part, an Arizona Corporation, having its principal offices in the City of Phoenix, County of Maricopa, State of Arizona;

Witnesseth:

Whereas, First Party is in the retail cheese business and has heretofore purchased two grades of cheese from Second Party, which grades of cheese are identified under the brand names of "La Barca" and "El Rey"; and

Whereas, an account has been stated between the parties hereto, arising out of previous transactions whereby it is mutually agreed between the parties hereto that First Party hereto owes to Second Party hereto, as of the date of this agreement, the sum of Thirty-seven hundred ninety-five and 04/100 (\$3795.04) Dollars; and

Whereas, it is the desire of both parties hereto to formulate an agreement for future dealings between the parties and to provide for a means of repayment of the stated balance due aforesaid;

Now, Therefore, in consideration of the premises and of the mutual promises by and between the parties as hereinafter set forth, it is hereby mutually agreed as follows:

1. First Party agrees to withdraw from the retail or wholesale merchandising of cheese under the trade-names of "La Barca" and "El Rey" in the states of Texas, New Mexico and Arizona. First Party further agrees that Second Party [23] shall

have the exclusive right to merchandise cheese under the trade names and brands of "La Barca" and "El Rey" in the three states aforesaid throughout the period of this agreement;

2. First Party agrees to purchase exclusively from Second Party all of those types of cheese merchandised by him in the State of California, which types of cheese are known as "Queso Duro" and "Queso Blanco" under the regulations of the California Department of Agriculture and more particularly described as chile cheese known as "La Barca" and white cheese known as "El Rey"; which types of cheese First Party agrees not to manufacture or purchase elsewhere than from Second Party so long as said types of cheese are available from Second Party upon the order of First Party. First Party reserves the right to manufacture or purchase said types of cheese elsewhere in such amounts and at such times as Second party notifies First Party that Second Party cannot supply said types of cheese in the amounts and at the times as they may be required to the order of First Party;

3. First Party agrees to pay Second Party for such amounts of the aforesaid types of cheese as may be ordered by him as follows:

Queso Duro Cheese, Brand "La Barca"

Bricks and loaves.....	07½c
Talls (11½ lbs.)	08c
Barcas (3 lbs.)	08c

Queso Blanco Cheese, Brand "El Rey"

(10 lbs.)	09c
-----------------	-----

4. First Party agrees specifically to pay one (1c) per lb. over and above the prices scheduled aforesaid for every pound of cheese ordered by him hereafter, which one [24] cent per pound is to be applied to the repayment of account stated, as set forth hereinabove, such added payment of one cent per pound to be paid until the delinquent account in the sum of \$3795.04 is paid in full with interest thereon from date at the rate of six (7) % per annum;

5. First party agrees to accompany each order for cheese sent to Second Party with a check drawn in a sum equivalent to payment in full for the amount of cheese so ordered at the prices scheduled in Paragraph 3 hereof, together with one cent per pound added as hereinabove provided for the number of pounds so ordered; such one cent per pound being for application on the past due account hereinbefore set forth;

6. First Party hereby agrees to execute herewith a promissory note in the sum of \$3795.04, with interest thereon at the rate of six per cent per annum, interest payable semi-annually, which note is payable at the rate of ninety (\$90.00) Dollars per month beginning on December 8, 1938, which said note shall be secured by a certain Deed of Trust to be executed concurrently herewith by First Party which Deed of Trust shall grant for security purposes nevertheless Lots 14 and 15, Block 9, Tract 5329, as per map recorded in Book 60, page 39 of Maps in the office of the County Recorder of Los Angeles County, and which Deed shall be subject, nevertheless, only to a certain Deed of Trust made and executed April 20,

1938, to John C. Licht and wife in the sum of \$2,000, the balance due on such Deed of Trust being represented by First Party as \$1850.00 at this date. Said promissory note shall further be secured [25] by a certain chattel mortgage made and executed concurrently herewith pledging all of the personal property located on the above-described premises and used for and in connection with the said cheese business of First Party, or as more particularly set forth in the inventory attached to the said chattel mortgage;

7. First Party specifically agrees to order and purchase from Second Party, freight to be paid by First Party, under the terms and conditions aforesaid, not less than nine thousand pounds of cheese per month hereafter of either "El Rey" or "La Barca," or both in the aggregate until such time as the delinquent account of \$3795.04 has been paid in full;

8. Second Party agrees to ship such amounts and kinds of cheese to First Party as are ordered by First Party and accompanied by the check of First Party, as hereinbefore provided, covering the sale price of said cheese as per schedule aforesaid plus one cent per pound on all cheese ordered, which one cent per pound Second Party agrees to apply to the delinquent account of First Party as aforesaid. Second Party further agrees that all cheese as ordered by First Party shall be of good quality and in merchantable condition. Second Party further agrees to supply said First Party, freight to be paid by First

Party, promptly upon receiving the order of First Party;

9. Second Party agrees to supply no other person or persons in the State of California with the grades and types of cheese, hereinbefore referred to, during the life of this agreement, and Second Party agrees to supply no cheese of the types aforesaid to any person anywhere knowing said cheese to be offered for sale in competition with First Party in the State of California during the life of this agreement.

It Is Mutually Agreed as Follows: [26]

10. It is hereby mutually agreed by and between the parties hereto that should First Party order and Second Party supply more than nine thousand (9,000) pounds of cheese in any given month hereafter, the amount of cheese over and above the nine thousand lbs., together with the payments made thereon, shall apply to the credit of the First Party for the next two-month period subsequent thereto, both as to the requirement that First Party purchase nine thousand pounds of cheese minimum per month, and as to the application of the payment of one cent per pound for such cheese over and above the purchase price to the credit of First Party's promissory note concurrently executed herewith, to the end that for any such three-month period hereafter First Party shall have purchased not less than twenty-seven thousand pounds of cheese, and shall have paid on account of the delinquent account, heretofore set forth, the sum of Two hundred seventy (\$270.00) Dollars over and above the purchase price paid for

cheese received by First Party in accordance with the schedule of prices hereinabove set forth;

11. It is further mutually agreed by and between the parties hereto that in the event of default by First Party of any of the terms and conditions in this agreement set forth, Second Party shall, upon such default, have the right to proceed with the enforcement of the security hereinbefore provided to Second Party by First Party, and that such remedy shall not be exclusive but that Second Party shall have the right or remedy in addition to the enforcement of such security as may be given by law, and such rights or remedies of Second Party are hereby jointly declared to be cumulative in effect and all shall be available to Second Party at one default of First Party;

12. It is hereby mutually agreed by and between the parties hereto that this agreement shall remain in full force [27] and effect so long as First Party owes any balance of account to Second Party, either in connection with the stated balance due at the date of the execution of this agreement, to-wit, \$3795.04, or in connection with any further credit extended to First Party during the life of this agreement, which additional credit may be granted at the option of Second Party, but which it is distinctly understood is not required to be given under the terms of this agreement.

In Witness Whereof, the parties hereto have here-

unto set their hands and seals the day and year first hereinabove written.

EVERT HAGAN,
First Party,
CENTRAL AVENUE DAIRY,
INCORPORATED,
By ED A. GEARE,
President. [28]

RETURN ON SERVICE OF WRIT

United States of America,
District of Arizona—ss:

Civil 8741-BH, So. Dist., Calif.

I hereby certify and return that I served the annexed Answer, Claim, Cross-Complaint of Defendant Complainant Hagan on the therein-named Kramer, Morrison, Roche and Perry by delivering to R. Wm. Kramer, member of firm and statutory agent for Central Avenue Dairy, by handing to and leaving a true and correct copy thereof with Mr. Kramer at 11:45 a.m. on the 9th day of November, personally at Phoenix in said District on the 9th day of November, 1948.

Service, \$2.00; Travel, .06.

B. J. McKINNEY,
U. S. Marshal,
By /s/ M. CASSIE BAKER,
Deputy.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 14, 1949. [29]

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant: Central Avenue Dairy, Inc.

You are hereby summoned and required to serve upon Gilbert E. Harris, plaintiff's attorney, whose address is 202 Title Insurance Building, Los Angeles 13, California, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

(Seal)

EDMUND L. SMITH,
Clerk of Court,

By /s/ G. A. SAUNDERS,
Deputy Clerk.

Date: October 7, 1948. [31]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 14th day of October, 1948, I received the within summons and on October 19, 1948, served the Central Avenue Dairy, Inc., by delivering to Edwin G. Geare, President of Company, copy of Summons with attached copy of Complaint in Interpleader and Order of Injunction and for Process and showing him the origi-

nal Summons at 10:15 a.m. at the Central Avenue Dairy, 3104 North Central Ave., Phoenix, Arizona.

Marshal's Fees: Travel, \$.24; Service, \$2.00; Total \$2.24.

B. J. McKINNEY,

United States Marshal,

By /s/ M. CASSIE BAKER,

Deputy United States Marshal.

[Endorsed]: Filed Nov. 3, 1948. [32]

At a stated term, to wit: The September Term. A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 8th day of November, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable: Ben Harrison, District Judge.

[Title of Cause.]

For hearing order to show cause why injunction should not be made permanent, and why decree should not be made discharging plaintiff from liability;

Arch H. Vernon, Esq., appearing as counsel for plaintiff, makes a statement that the money is now on deposit in the Registry of the Court.

Guy B. Graham, Esq., appearing as counsel for Defendant Hagan only, states no objection to granting motion of plaintiff.

Court grants permanent injunction and discharges plaintiff from liability in this cause. Attorney Graham makes a statement re cross-complaint, and Court allows cross-defendant Central Avenue Dairy to Nov. 22, 1948, to answer cross-complaint of Defendant Hagan. [33]

In the District Court of the United States, Southern
District of California, Central Division

Civil—No. 8741-BH

TITLE INSURANCE AND TRUST COMPANY,
a corporation,

Plaintiff,

vs.

EVERT HAGAN, doing business as EL REY
CHEESE CO., and CENTRAL AVENUE
DAIRY, INC., a corporation,

Defendants.

DECREE

The above-entitled action duly came on for hearing in the above-entitled Court before the Honorable Ben Harrison, Judge of said Court, on the 8th day of November, 1948, upon the Order of Injunction and for Process herein dated October 7, 1948, requiring defendants, and each of them, to show cause why the injunction heretofore granted should not be made permanent and why a decree should not be made discharging plaintiff from any and all liability to said defendants, or any or either of them;

Arch. H. Vernon, Lawrence L. Otis and Gilbert E. Harris, by Arch. H. Vernon, Esq., appearing for plaintiff; and

Guy B. Graham, Esq., appearing for defendant Evert L. Hagan, doing business as El Rey Cheese Company;

There being no appearance on the part of defendant Central [34] Avenue Dairy, Inc., a corporation; and

It appearing that the Summons and Complaint herein and Order of Injunction and for Process, dated October 7, 1948, had been duly served upon the defendant Central Avenue Dairy, Inc., a corporation, and that said defendant has not answered the complaint herein nor appeared herein; and

It appearing from the pleadings filed herein that the allegations contained herein are, and each of said allegations is, true; and the Court being fully advised in the premises;

It Is Ordered and Decreed:

That said defendants and their representative Attorneys, agents, or representatives, or any or either of them, be, and hereby are, forever enjoined from instituting or prosecuting any suit or proceeding in any State Court or in any United States Court on account of the money described in the complaint herein.

That plaintiff be, and hereby is, forever discharged from any and all liability to said defendants, or any or either of them, on account of said money described in the complaint herein, to wit, the sum of \$1750.00

deposited by plaintiff in the Registry of this Court to abide the further order of the Court herein.

Dated November 15, 1948.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed Nov. 15, 1948. [35]

[Title of District Court and Cause.]

NOTICE OF MOTION TO QUASH AND SET
ASIDE ATTEMPTED SERVICE OF PROC-
ESS AND TO QUASH AND SET ASIDE AT-
TEMPTED SERVICE OF ANSWER, CLAIM
AND CROSS - COMPLAINT OF DEFEND-
ANT-CLAIMANT EVERT L. HAGAN.

To Evert L. Hagan, Doing Business as El Rey Cheese Company, Defendant and Claimant, and to Guy B. Graham, Esq., His Attorney, 115 N. Eastern Avenue, Los Angeles 22, California; and Title Insurance and Trust Company:

You, and Each of You, will please take notice that Central Avenue Dairy, Inc., a corporation, by its attorneys, Bodkin, Breslin & Luddy, hereby appears specially in this action for the purpose of this motion only, and that said Central Avenue Dairy, Inc., so specially appearing by its attorneys, will move the above-entitled court in Court Room 6 of said Court, before the Hon. Benjamin Harrison, Judge of said District Court, on Monday, December 6, 1948, at the hour of 10:00 o'clock a.m., of said day to quash and set aside the attempted service of process and to

quash and set aside the attempted service of the answer, claim and [36] cross-complaint of defendant claimant Evert L. Hagan upon defendant Central Avenue Dairy, Inc.

That said motion will be made on the following grounds:

1. The delivery of a copy of the answer, claim and cross-complaint of defendant claimant Evert L. Hagan to R. William Kramer on November 9, 1948, or at any other time, as agent appointed pursuant to the laws of the State of Arizona, to receive service of process on behalf of defendant Central Avenue Dairy, Inc., an Arizona corporation, at the City of Phoenix, Maricopa County, State of Arizona, said City of Phoenix, in the State of Arizona, being outside of the Federal District and outside of the state in which the above-entitled court is held, and no copy of the summons upon the cross-complaint being attached to or delivered with said answer, claim and cross-complaint, was not sufficient to vest the above-entitled court with jurisdiction over the person of defendant Central Avenue Dairy, Inc.

2. The delivery of a copy of the answer, claim and cross-complaint of defendant claimant Evert L. Hagan to R. William Kramer personally on November 9, 1948, as the agent appointed pursuant to the laws of the State of Arizona to receive process on behalf of defendant Central Avenue Dairy, Inc., an Arizona corporation, at the City of Phoenix, Maricopa County, State of Arizona, at which time no copy of the summons on the cross-complaint was attached to or served with said answer, claim and cross-com-

plaint, said defendant Central Avenue Dairy, Inc., not having made a general or special appearance in said action prior to the delivery of a copy of such answer, claim and cross-complaint to said R. William Kramer was not sufficient to vest the above-entitled court with jurisdiction over the person of the defendant Central Avenue Dairy, Inc.

3. That the mailing on October 30, 1948, of a copy of the answer, claim and cross-complaint of defendant claimant Evert L. [37] Hagan to Kramer, Morrison, Roche & Perry at the City of Phoenix, County of Maricopa, State of Arizona, as the alleged attorneys for defendant Central Avenue Dairy, Inc., said defendant not having theretofore made a general or special appearance in said action and no copy of the summons on the cross-complaint having been attached to or mailed with said answer, claim and cross-complaint was not sufficient to vest the above-entitled court with jurisdiction over the person of defendant Central Avenue Dairy, Inc.

That said motion will be made upon the affidavits of Ed A. Geare and R. William Kramer served and filed herewith and upon the files, records and papers in the above-entitled action.

Dated: November 22, 1948.

BODKIN, BRESLIN & LUDDY,
By /s/ HENRY G. BODKIN,
Attorneys for defendant,
Central Avenue Dairy, Inc.

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 22, 1948. [38]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO
QUASH AND SET ASIDE ATTEMPTED
SERVICE OF PROCESS AND TO QUASH
AND SET ASIDE ATTEMPTED SERVICE
OF ANSWER, CLAIM AND CROSS - COM-
PLAINT.

District of Arizona,
County of Maricopa—ss.

Ed A. Geare, being first duly sworn, upon oath de-
poses and says:

That he is President and General Manager of Cen-
tral Avenue Dairy, Inc., a corporation; that said
Central Avenue Dairy, Inc., is a corporation organ-
ized and existing under the laws of the State of Ari-
zona, having its principal place of business in the
City of Phoenix, Maricopa County, Arizona, and that
said Central Avenue Dairy, Inc., was incorporated
under the laws of the State of Arizona on the 24th
day of May, 1926;

Affiant further states that said defendant Central
Avenue Dairy, Inc., has never done any intrastate
business in the State of [40] California; that it never
did, and does not now, have any agent in the State
of California; that it has never maintained an office
in said State of California; and that any business
which it may have had in said State of California
was wholly interstate in its nature;

That at no time prior to the date hereof has de-
fendant Central Avenue Dairy, Inc., a corporation,

made any general or special appearance in the above-entitled action.

/s/ ED A. GEARE.

Subscribed and sworn to before me this 19th day of November, 1948.

(Seal) /s/ AMY SWEEN,
Notary Public in and for said County and State.

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 22, 1948. [41]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO
QUASH AND SET ASIDE ATTEMPTED
SERVICE OF ANSWER, CLAIM AND
CROSS-COMPLAINT.

District of Arizona,
County of Maricopa—ss.

R. William Kramer, being first duly sworn, deposes and says:

That he is an attorney at law duly licensed to practice in all of the courts of the State of Arizona and is a member of the law firm of Kramer, Morrison, Roche & Perry with offices at Phoenix, Arizona, and that at all times hereinafter mentioned the affiant was, and now is, a resident of the County of Maricopa, State of Arizona; that on November 9, 1948, the United States Marshal for the United States District Court of Arizona, acting by and through one of

his authorized deputies delivered to your affiant at the City of Phoenix, County of Maricopa, State of Arizona, United States District Court of Arizona, outside of the District of the United States for the Southern District of California, Central Division, as statutory agent for the Central Avenue Dairy, Inc., in the State of Arizona, one copy only of the answer, claim and cross-complaint of defendant claimant Evert L. Hagan in the above-entitled action, which action is pending in the District Court of the United States, for the Southern District of California, Central Division, and that the said defendant Central Avenue Dairy, Inc., had not on November 9, 1948, or at any time prior thereto, made any general or special appearance in said action and that there was not attached to or delivered with said copy of the answer, claim and cross-complaint any copy of a summons on the cross-complaint;

That affiant is informed and believes and therefore alleges that the United States District Court for the Southern District of California, Central Division, acquired, and has, no jurisdiction whatever over Central Avenue Dairy, Inc., which is a corporation organized and existing under and by virtue of the laws of the State of Arizona; that Central Avenue Dairy, Inc., has no agent or agents in the State of California, nor is it doing any business whatsoever in said State;

That there was no copy of the summons on the cross-complaint attached to the copy of the said answer, claim and cross-complaint which was mailed to

the law firm of Kramer, Morrison, Roche & Perry on October 30, 1948;

Wherefore, affiant prays that an order be made quashing and setting aside the attempted service of the answer, claim and cross-complaint of defendant Evert L. Hagan upon defendant [44] Central Avenue Dairy, Inc., in the above action, for the reasons specified in the foregoing portions of this affidavit.

/s/ R. WILLIAM KRAMER.

Subscribed and sworn to before me this 19th day of November, 1948.

(Seal) /s/ GENE GLADNEY,

Notary Public in and for said County and State.

My commission expires July 23, 1949.

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 22, 1948. [45]

In the District Court of the United States for the
Southern District of California, Central Division

File No. 8741-BH

TITLE INSURANCE & TRUST CO., a corpora-
tion,

Plaintiff,

vs.

EVERT HAGAN, dba El Rey Cheese Company, and
CENTRAL AVENUE DAIRY, INC., a corpora-
tion,

Defendants-Claimants.

JUDGMENT OF DISMISSAL

The motion of defendant Central Avenue Dairy, Inc., to quash and set aside the attempted service of process and to quash and set aside the attempted service of answer, claim and cross-complaint of defendant Evert L. Hagan, came on regularly to be heard before the Honorable Ben Harrison, Judge of the above-entitled Court, on December 20, 1948, the said Evert L. Hagan appearing by his counsel, Guy B. Graham, Esq., and George W. Rochester, Esq., and Central Avenue Dairy, Inc., appearing by its counsel Henry G. Bodkin, Esq., of Bodkin, Breslin & Luddy, and the Court having heard the argument of counsel and the matter having been heretofore submitted and the Court being fully advised in the premises, does hereby find that said motion should be granted and said cross-complaint dismissed for lack

of jurisdiction of the defendant [47] Central Avenue Dairy, Inc., an Arizona corporation;

Wherefore, It Is Hereby Ordered, Adjudged and Decreed that the said motion be, and the same is hereby granted and said cross-complaint of defendant Evert L. Hagan against defendant Central Avenue Dairy, Inc., is hereby dismissed for lack of jurisdiction of defendant Central Avenue Dairy, Inc., an Arizona corporation.

Done This 31st day of Dec., 1948.

/s/ BEN HARRISON,
District Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 31, 1948. [48] .

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT OF
DISMISSAL

To Title Insurance & Trust Co., and to Arch H. Vernon, Its Attorney; and to Evert L. Hagan, Doing Business as El Rey Cheese Company, and to Messrs. Guy B. Graham and George W. Rochester, His Attorneys:

You, and Each of You, will please take notice that the judgment of dismissal of the cross-complaint of Evert L. Hagan, doing business as El Rey Cheese Company, against the defendant Central Avenue Dairy, Inc., an Arizona corporation, was entered De-

ember 31, 1948, in Civil Order Book 55 at page 44 of the above-entitled Court.

Dated: January 5, 1949.

BODKIN, BRESLIN & LUDDY,

By /s/ G. STUART SILLIMAN,

Attorneys for defendant Central Avenue Dairy, Inc.

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 6, 1949. [50]

In the District Court of the United States for the
Southern District of California, Central Division

File No. 8741-BH

TITLE INSURANCE AND TRUST COMPANY,
a corporation,

Plaintiff,

vs.

EVERT L. HAGAN, doing business as El Rey
Cheese Company, and Central Avenue Dairy,
Inc., a corporation,

Defendants.

CIVIL INTERPLEADER ACTION — JUDG-
MENT RE MONEYS DEPOSITED IN IN-
TERPLEADER

That the above-entitled action was filed by the plaintiff under the act approved January 25, 1948, Chapter 646 Public Law 773, Laws of the 80th Congress, 2nd Session; U. S. Code Title 28, Section 1335.

That in connection therewith the plaintiff deposited with this court the sum of \$1750.00 and that the plaintiff made no claim to said sum and requested that the said sum be disbursed to the person legally entitled thereto;

That process was issued by the court directed to the defendants and was duly and regularly served on each of said defendants;

That the defendant Evert L. Hagan filed an answer to plaintiff's complaint and a claim for the moneys deposited in court [52] and further a cross-complaint against the defendant Central Avenue Dairy, Inc., seeking other affirmative relief;

That the defendant Central Avenue Dairy, Inc., failed to answer the plaintiff's complaint and that upon November 15, 1948, this court made a decree enjoining the defendants and either of them from executing or prosecuting any suit or proceedings in any State or U. S. Court on account of moneys described in the complaint and deposited by plaintiff, and discharging plaintiff from any and all further liability in connection with said matter, and further providing that said moneys remain on deposit subject to further order of the Court herein;

Thereafter the defendant Central Avenue Dairy, Inc., appeared specially in the above-entitled action and made no claim to the moneys deposited in said action but moved the court to quash and set aside the attempted service of process and attempted service of the answer, claim and cross-complaint of the defendant, Evert L. Hagan.

That thereafter this Court granted judgment upon

such motion, adjudging that the cross-complaint of the defendant Evert L. Hagan against the defendant Central Avenue Dairy be dismissed for lack of jurisdiction of the defendant Central Avenue Dairy, Inc.

That judgment of dismissal was entered on December 31, 1948, in Civil Order Book 55, Page 44.

That notice of appeal from said judgment of dismissal was filed on January 7, 1949, for and in behalf of the defendant and cross-complainant, Evert L. Hagan. That no appeal has been taken from the decree of this Court of November 15, 1948, and that the time for the taking of any such appeal and for filing of notice of appeal from said decree has expired.

That said sum of \$1750.00 still remains upon deposit with the said Court and that the defendant Evert L. Hagan is the only party who has laid claim to said sum, and [53]

It Appearing that there is no just reason for delay in the disbursement of said sum to said defendant Evert L. Hagan pending his appeal upon and from order of dismissal of his cross-complaint against the defendant Central Avenue Dairy, Inc., and

It Further Appearing that judgment should be made and entered disbursing said sum of \$1750.00 to said Evert L. Hagan at this time;

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed:

That the default of the defendant Central Avenue Dairy, Inc., to the complaint filed herein and process issued and served thereon be entered forthwith.

That the sum of \$1750.00 on deposit with this court

in this action be immediately paid to the said defendant, Evert L. Hagan herein.

The Clerk of this Court Is Hereby Ordered to immediately enter this judgment.

It Is Hereby Adjudged that there is no just reason for delay in the granting of this judgment or for its entry by the Clerk of this Court.

Judgment Is Granted and Directed to Be Entered Without Prejudice to the Appeal Now Pending on Behalf of the Defendant Evert L. Hagan from the judgment of dismissal of the cross-complaint, said judgment having been entered on December 31, 1948, in Civil Order Book 55 at page 44 of the above-entitled Court.

Dated February 15th, 1949.

/s/ BEN HARRISON,
Judge of the United States District Court.

Judgment entered Feb. 15, 1949.

[Endorsed]: Filed Feb. 15, 1949. [54]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Central Avenue Dairy, Inc., and Bodkin-Breslin & Luddy, its Attorneys:

You and Each of You Take Notice, that the claimant and defendant, Evert L. Hagan, does hereby appeal to the United States Circuit Court of Appeals

for the Ninth Circuit, from the Orders and Judgment of the above-entitled Court in the above-entitled Action and all proceedings therein.

Dated: January 3, 1949.

/s/ GUY B. GRAHAM,
Attorney for Defendant Evert L. Hagan.

(Duly Verified.)

(Affidavit of Service by Mail attached.)

Endorsed: Filed Jan. 7, 1949. [55]

[Title of District Court and Cause.]

EXTENSION OF TIME

Good cause appearing therefore, it is hereby,

Ordered:

That the defendant, claimant, cross-complainant and appellant, Evert L. Hagan, may have up to and including the 2nd day of April, 1949, to file with the Clerk of the Circuit Court of Appeals, the record on appeal and said appeal to be docketed in said Court.

Dated: This 9th day of February, 1949.

/s/ PAUL J. McCORMICK,
Judge of the United States District Court.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 9, 1949. [57]

[Title of District Court and Cause.]

STIPULATION RESPECTING CASH
DEPOSIT IN LIEU OF BOND

Evert L. Hagan, defendant, claimant, cross-complainant and appellant in the above-entitled action, hereby and herewith deposits with the Clerk of the above-entitled court, in lieu of furnishing a personal surety bond as required by Rule 73 (c) of the Federal Rules of Civil Procedure, cash, in the sum of Two hundred fifty and no/100 (\$250.00) Dollars, and hereby stipulates, consents and agrees that said sum of Two hundred fifty and no/100 (\$250.00) Dollars, shall be and constitute the bond of appellant for costs on appeal as required by law and that the same shall secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of [59] such costs as the Appellate Court may award if the judgment is modified. Said defendant and cross-claimant, stipulates, consents and agrees that in the case of default or contumacy on the part of said defendant and cross-claimant or his attorney, the court may upon notice to said defendant and cross-claimant of not less than 10 days, proceed summarily and render judgment against said defendant and cross-claimant in accordance with his obligation hereunder and award execution thereon.

Witness my hand and seal this 21st day of February, 1949.

/s/ EVERET L. HAGAN,

Defendant, claimant, cross-complainant and appellant.

State of California,
County of Los Angeles—ss:

On this 21st day of February, 1949, before me, Rita Finn, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Evert L. Hagan, known to me to be the person whose name is subscribed to the within Stipulation and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) /s/ RITA FINN,
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires Feb. 18, 1952.

Approved:

/s/ BEN HARRISON,
Judge.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 21, 1949. [60]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

By way of preface it should be stated that a default judgment was granted claimant Evert L. Hagan upon his claim filed herein to the funds deposited

in interpleader. This appeal does not involve this default judgment, but only the order of the District Court refusing to entertain the cross-claim or cross-complaint. The Point on appeal is:

In an interpleader action filed under the Act approved January 25, 1948, Chapter 646, Public Law 773, Laws of the 80th Congress, Second Session; United States Codes, Title 28, Section 1335, wherein the court has obtained jurisdiction [62] of both claimants, and interpleader is adjudged to be proper, may the court entertain a cross-claim or cross-complaint by the claimant resident in the state where the court is sitting against the non-resident claimant, where the cross-claim or cross-complaint was served and filed by the resident claimant upon the nonresident claimant, when the cross-claim or cross-complaint involves a claim for damages, in addition to the claim for the fund deposited in interpleader, when the claim for the fund deposited, and the claim for damages arise from and are based upon an alleged breach of the same contract?

Dated: February 21, 1949.

/s/ CHARLES WILLIAMS,

Attorney for defendant, claimant, cross-complainant
and appellant Evert L. Hagan.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 21, 1949. [63]

[Title of District Court and Cause.]

REQUEST AND DESIGNATION OF
PORTIONS OF RECORD FOR
APPEAL

The defendant, claimant, cross - complainant and appellant, Evert L. Hagan, having filed notice of appeal from the judgment of Dismissal filed in the above-entitled action upon December 31, 1948, hereby requests that the Clerk of the above-entitled Court prepare and certify the following portions of the record as the record on appeal and transmit a true copy of the following:

The complaint in interpleader.

Deposit of money in interpleader receipt.

Motion to issue summons and order thereon of Oct. 7, 1948.

Order of injunction and for process of Oct. 7, 1948.

Answer, claim and cross-complaint of Evert L. Hagan.

Summons issued to Central Avenue Dairy, Inc., and return of service thereon. [65]

Order making injunction permanent.

Minute Order permitting cross-defendant Central Avenue Dairy, Inc., to answer, dated November 8, 1948.

Decree dated November 15, 1948.

Notice of Motion of Central Avenue Dairy, Inc., to quash and set aside service filed November 22, 1948.

Affidavits in support of motion to quash and set aside service.

Judgment of Dismissal filed December 31, 1948.

Notice of Entry of Judgment.

Notice of Appeal.

Return of Writ, Service of Answer, Claim, Cross-complaint on Kramer, Morrison, Roche and Perry.

Judgment re monies deposited in interpleader.

Cost Bond on Appeal.

Designation of portions of record for appeal.

Statement of Points on Appeal.

Dated: February 21, 1949.

/s/ CHARLES WILLIAMS,

Attorney for defendant, claimant, cross-complainant
and appellant, Evert L. Hagan.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed February 21, 1949. [66]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 67, inclusive, contain the original Complaint in Interpleader; Deposit; Motion; Order of Injunction and for Process; Answer, Claim and Cross-Complaint of Defendant-Claimant, Evert L. Hagan; Summons and Return of Service; Decree; Notice of Motion to Quash and Set Aside Attempted Service of Process and to Quash and Set Aside Attempted Service of Answer, Claim and Cross-Complaint of Defendant-Claimant Evert L. Hagan; Affidavits of Ed A. Geare and R. William Kramer in Support of Motion to Quash, etc.; Judgment of Dis-

missal; Notice of Entry of Judgment of Dismissal; Judgment re Moneys Deposited in Interpleader; Notice of Appeal; Order Extending Time to Docket Appeal; Stipulation Respecting Cash Deposit in Lieu of Bond Statement of Points on Appeal and Designation of Record on Appeal and a full, true and correct copy of Minute Order Entered November 8, 1948, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 22nd day of March, A.D. 1949.

(Seal)

EDMUND L. SMITH,
Clerk.

[Endorsed]: No. 12211. United States Court of Appeals for the Ninth Circuit. Evert L. Hagan, doing business as El Rey Cheese Co., Appellant. vs. Central Avenue Dairy, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 24, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Civil Interpleader Action

No. 12211

EVERT L. HAGAN,

Appellant,

vs.

CENTRAL AVENUE DAIRY, INC., a corporation,
Respondent.

STATEMENT OF POINTS ON APPEAL

By way of preface it should be stated that a default judgment was granted claimant Evert L. Hagan upon his claim filed herein to the funds deposited in interpleader. This appeal does not involve this default judgment, but only the order of the District Court refusing to entertain the cross-claim or cross-complaint. The Points on Appeal are:

1. In an interpleader action filed under the Act approved January 25, 1948, Chapter 646, Public Law 773, Laws of the 80th Congress, Second Session, United States Codes, Title 28, Section 1335, wherein the Court has obtained jurisdiction of both claimants, and interpleader is adjudged to be proper, may the Court entertain a cross-claim or cross-complaint by the claimant resident in the state where the Court is sitting against the non-resident claimant, where the cross-claim or cross-complaint was served and filed by the resident claimant upon the non-resident claimant, when the cross-claim or cross-complaint in-

volves a claim for damages, in addition to the claim for the fund deposited in interpleader, when the claim for the fund deposited, and the claim for damages arise from and are based upon the same breach of the same contract?

2. Appellant contends that the District Court having once obtained jurisdiction of the non-resident Central Avenue Dairy, Inc., for the purposes of interpleader, had jurisdiction to adjudicate cross-claims between claimants which were germane to the issues involved in the interpleader.

3. The District Court erred in ruling it could not entertain a cross-claim by the resident claimant against the non-resident claimant where the cross-claim arose out of the same breach of the same contract that the deposit in the interpleader and the conflicting claims thereto arose.

4. The District Court erred in dismissing a cross-claim where the two claimants are before the Court in interpleader and the deposit is claimed by one claimant by virtue of a breach of a contract, and the same claimant also claims damages by way of cross-claim for the same breach of the same contract.

Dated: April 14th, 1949.

/s/ CHARLES WILLIAMS,
Attorney for Defendant, Claimant, Cross-Claimant
and Appellant Evert L. Hagan.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 16, 1949. Paul P. O'Brien,
Clerk.